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No. 85-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, *et al.*,

Petitioners,

v.

JOSEPH P. GALDA, *et al.*,

Respondents.

BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTERESTS OF AMICUS CURIAE

Amicus Curiae National Association of State Universities and Land-Grant Collges ("Association") represents the interests of 148 of the nation's principal public universities.[1] These colleges and universities, which generally are supported primarily by state funds, will be directly and adversely affected if the decision of the Third Circuit is

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[1]The members of the Association are identified in the Addendum attached hereto. All parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

allowed to stand. Accordingly, on behalf of its members, the Association urges this Court to grant the petition for certiorari filed by Rutgers, The State University of New Jersey ("Rutgers"), in No. 85-1036, and to set the case for briefing and oral argument.[2]

STATEMENT

The background of this litigation and the evolution of the funding mechanism at issue in this case are adequately set forth in Rutgers' petition, and will not be repeated here. Similarly, because Rutgers' petition presents a comprehensive statement of the reasons why plenary review of the decision below is warranted, *amicus* joins in the arguments made by Rutgers rather than attempting to restate them. *Amicus* believes, however, that it is worthwhile to file this brief to bring to the Court's attention two issues of critical importance to the Association and its members.

First, the decision below disregards basic principles of academic freedom, and needlessly entangles the courts in scrutinizing the fundamentally academic decisions made by university faculties and administrators. *Second,* the Third Circuit's ruling threatens the ability of state-funded colleges and universities to encourage diversity of student groups on campus. The decision below stands as an open invitation to students who disagree with the positions taken by any student organization receiving any sort of support from a university to utilize federal court actions as

[2] *Amicus* recognizes that the New Jersey Public Interest Research Group ("NJPIRG") has also filed a petition for certiorari, No. 85-1037, seeking review of the same judgment at issue here. Because NJPIRG's petition seeks the same result as the petition filed by Rutgers, *amicus* supports NJPIRG's petition as well.

a mechanism for tailoring the university's educational programs and activities to suit their own views and beliefs. That prospect is obviously of grave concern to *amicus* and its members. Thus, because this case has far-reaching implications for every state-supported university in the nation, it warrants plenary review by this Court.

ARGUMENT

A. Prior Decisions of This Court Require a Grant of Certiorari

This Court has long recognized that in order to foster diversity and excellence in our nation's educational institutions, a college or university must be accorded the latitude " 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.' " *Widmar v. Vincent,* 454 U.S. 263, 278 (1981), *quoting Sweezy v. New Hampshire,* 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result). Indeed, just two months ago, this Court proclaimed:

> When judges are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee did not actually exercise professional judgment.

Regents of the University of Michigan v. Ewing, 54 U.S.L.W. 4055, 4058 (U.S. No. 84-1273, December 12 1985) (citation and footnote omitted). Whether the judgment concerns grades or the recognition of student organizations, this Court has consistently adhered to "this Nation's dedication to safeguarding academic freedom" because

"the college classroom with its surrounding environs is peculiarly the 'marketplace of ideas . . .' " *Healy v. James,* 408 U.S. 169, 180-81 (1972), *quoting Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). *See Sweezy v. New Hampshire,* 345 U.S. at 249-50 (plurality opinion of Warren, J.).

In enjoining Rutgers' assessment of the fee payable to NJPIRG, the majority below overstepped the narrow bounds drawn by this Court for judicial review of academic judgments. There is no serious dispute that Rutgers' faculty and administration carefully exercised their professional, academic judgments in formulating the fee policy that is under attack in this case. The record is clear and undisputed on this point. After extensive deliberations involving faculty, administrators and students, Rutgers reached the decision to create a neutral funding policy — not just for NJPIRG — but for any organization that could demonstrate (1) broad student support and (2) a substantial contribution to the educational mission of the university. Nor can there be any claim that Rutgers' policy is at variance with "accepted academic norms," since the record in this case makes plain that several other leading state universities have reached the same educational judgment as Rutgers. *See* App. at 97a-99a. *Amicus* submits that the failure of the majority below to recognize and apply the standards of judicial restraint applicable to this case is more than ample reason for plenary review.

B. The Lower Court's Decision Impermissibly Curtails a University's Discretion in Funding Student Groups and in Encouraging Diversity Among Those Groups

This case graphically illustrates the pitfalls which courts encounter when they attempt to second-guess educational judgments. The majority below enjoined Rutgers' neutral

funding of NJPIRG based upon the Court's assessment of the organization's educational benefits as merely "incidental" to its "frankly ideological bent." App. at 13a. This conclusion was based upon the judgment that "PIRG's efforts are primarily devoted to changing conditions outside the University . . . [and] [w]hile such matters may affect the general public, those causes are not particularly germane to students of the University qua students." App. at 12a. Supplanting Rutgers' judgment with its own regarding an organization's capacity to contribute to the educational mission of the university, the majority discounted those groups with political or ideological objectives.

In *amicus'* view, the lower court adopted a particularly parochial approach toward education. The majority assumed that the only groups which can both take public policy stances and substantially contribute to a school's educational mission are student service organizations. This position ignores the crucial leadership, organizational, and communications skills offered by entities involved in the dynamics of public events outside of the controlled university environment. Exercising their professional judgment as educators, Association members have encouraged students to round out their academic training through supervised off-campus internships involving areas of public concern.

While tacitly recognizing the educational benefit of internship programs, the majority below concluded that this value substantially diminishes when the sponsor of the internship promotes ideological objectives. According to the court, this diminution is so substantial that state university support of the sponsor loses its constitutional protection and, in fact, becomes unconstitutional. Despite this harsh result, the lower court offered no guidance to educational institutions in their newly imposed mission of determining whether, and to what extent, student groups espouse an

ideology. As a result, the majority below placed state-run universities in the role of censor, picking and choosing among student groups on the basis of their message. As Judge Adams noted in his dissent, this is precisely the role state universities are barred from assuming by the First Amendment. App. 26a, 38a. *See also Widmar v. Vincent,* 454 U.S. at 277; *Healy v. James,* 408 U.S. at 188-89.

The majority's misconception of a university's role in determining whether to support student groups – which is the core of its decision – carries serious consequences. Under the decision, any time a state university decides to support a student organization – with funding, meeting space, or anything else of value – the university exposes itself to litigation under the civil rights laws by students with different points of view. Thus, the decision below, if allowed to stand, compels a university to choose between two equally unattractive alternatives.

On the one hand, the university can play the role contemplated by the majority and effectively censor student groups – limiting the university's forum to those few groups which take no positions on political or otherwise controversial issues. We submit that such a result, which would transform campuses into sterile, isolated ivory towers, is antithetical to the basic mission of a university – exposure to diverse views. On the other hand, the university can continue to encourage a diverse forum, but, under the analysis of the decision below, be subject to lawsuits brought by students who disagree with the policies espoused by any student organization the university in some form supports. Neither of these results, we submit, is consistent with fundamental notions of academic freedom, much less compelled by the First Amendment. Because the decision below thrusts state-supported academic institutions into this thicket, we urge the Court to grant the peti-

tion for certiorari submitted by Rutgers and set this case down for briefing and argument.

CONCLUSION

For the reasons set forth above, the Court should grant Rutgers' petition and issue a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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. ADDENDUM

Alabama A&M University
Alcorn State University
Arizona State University
Auburn University
Bowling Green State University
City University of New York
Clemson University
College of the Virgin Islands
Colorado State University
Colorado State University, Boulder
Connecticut Agricultural Experiment Station
Cornell University
Delaware State College
Florida A&M University
Florida State University
Fort Valley State College
Georgia Institute of Technology
Indiana University
Iowa State University
Kansas State University
Kent State University
Kentucky State University
Langston University
Lincoln University
Louisiana State University
Louisiana State University, Baton Rouge
Massachusetts Institute of Technology
Miami University
Michigan State University
Mississippi State University
Montana State University
New Mexico State University
North Carolina A&T State University
North Carolina State University
North Dakota State University

Ohio State University
Ohio University
Oklahoma State University
Oregon State System of Higher Education
Oregon State University
Pennsylvania State University
Prairie View A&M University
Purdue University
Rutgers, The State University of New Jersey
South Carolina State College
South Dakota State University
Southern Illinois University, Carbondale
Southern Illinois University System
Southern University
State University of New York, Albany
State University of New York, Binghamton
State University of New York, Buffalo
State University of New York, Stony Brook
State University of New York System
Temple University
Tennessee State University
Texas A&M University
Texas A&M University System
Texas Tech University
The State University System of Florida
The University of Alaska Statewide System
Tuskegee Institute
University of Alabama in Birmingham
University of Alabama System
University of Alabama, Tuscaloosa
University of Alaska, Fairbanks
University of Arizona
University of Arkansas, Fayetteville
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Virginia State University
Washington State University
Wayne State University
West Virginia University